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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 685

GORHAM AND JOHNSON, INC.,
Petitioner,

v.

CHRYSLER CORPORATION, CHRYSLER MOTORS CORPORATION, SIMCA, S. A. OF FRANCE, SIMCA, INC. AND C. S. HAMILTON MOTOR COMPANY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Gorham and Johnson, Inc., hereinafter called petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on September 25, 1962.

OPINION BELOW

The opinion of the Court of Appeals (infra, Appendix pp. 31-45) is reported at *308 F. 2d 462*.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on September 25, 1962 (R. p. 402, Appendix p. 47).

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether reports by the Subcommittee on Antitrust and Monopoly of the United States Senate reflecting a "Study of Administered Prices in the Automobile Industry" and a study of the effect of "The Automobile Franchise" upon manufacturer-dealer relationships, offered in the form of official publications thereof, are sufficiently trustworthy to be admitted in evidence under the Learned Treatise Exception to the Hearsay Rule; and, if so, whether the factual data in such reports is relevant to the issues in a private action under Clayton Act §4 brought by an automobile dealer who was driven out of business by a combination of manufacturers, distributors and other dealers.

2. Whether a person can be "injured in his business or property" by a stock acquisition violative of Clayton Act §7 when the contract providing for the stock acquisition also provides for that person's ouster from his dealership under the company whose stock is acquired; or whether, as a matter of law, a stock acquisition cannot constitute the legal cause of an injury to the business or property of a private party even though it is accompanied and followed by corporate action

which does produce such injury. In other words: Whether the Attorney General of the United States is the only party who has standing to complain of a violation of Clayton Act §7.

3. Whether "monopoly power" as that concept is employed in construing Sherman Act §2 means power of such magnitude as to enable the wielder to exclude *all* competition from —and to fix all prices in—the relevant market concerned; or whether it simply means power of sufficient magnitude to drive out *some* competition and to fix *some* prices: leaving to be answered by the factfinder the ultimate question of whether a monopolizing or an attempt to monopolize has actually occurred: i.e., whether the wielder of the power in question did in fact either attempt to, or proceed to, drive out or exclude a competitor from the relevant market and/or fix prices therein.

4. Whether a common law action for tortious interference with business relationships is stated and is within the jurisdiction of a federal district court when it is predicated upon the same facts that are alleged to be violative of the antitrust law.

5. Whether it appears from the whole record that erroneous rulings of the trial judge upon the foregoing questions were harmless and did not prejudice petitioner.

STATUTES INVOLVED

The statutes involved are Sherman Act §1 and §2, being §1 and §2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. §1 and §2; and Clayton Act §4

and §7, being §4 and §7 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended, 15 U. S. C. A. §15 and §18 and same are set out in the Appendix, infra, pages 48-51.

STATEMENT OF THE CASE

The operative facts of this case are very simple.

In 1958, the petitioner established itself as a dealer in Dallas County, Texas for Simca automobiles, manufactured in France by Simca, S. A. of France (originally named Societe Industrielle de Mechanique et Carrosserie Automobile), hereinafter called French Simca, and imported into the United States by Kurland Motors of Denver, Colorado, a copartnership which had been appointed and was functioning as a distributor for Simca automobiles in fourteen midwestern and southwestern states.

At about the same time, Chrysler Corporation decided it needed a small European or British automobile to distribute both in world markets and in the United States; and concluded that it was imperative that it act within a very short time. After unproductive negotiations with several other British and European manufacturers, it concluded a contract with French Simca (and a group of French Simca's major shareholders) whereby Chrysler acquired (i) 25% of French Simca's stock, (ii) the exclusive distribution rights on Simca automobiles in the United States, (iii) an assignment of all Simca's franchise agreements with its existing distributors and dealers, and (iv) the power to terminate all such existing Simca distributors and dealers in the United States.

Chrysler proceeded to oust all such distributors and dealers including Kurland Motors of Denver and this petitioner. It established a wholly owned subsidiary, Chrysler Motors Corporation, as its distributor and appointed its own dealers under Chrysler Motors. Most of the new dealers already held other Chrysler franchises; and all new Simca dealers appointed in Dallas were established dealers in Chrysler products.

Neither Kurland Motors nor this petitioner gave up their respective businesses without a struggle. Their efforts to stay in business drew a cash settlement for Kurland, and for petitioner: retaliatory action by Chrysler including a group boycott organized by Chrysler among those of its newly appointed Simca dealers who were "bootlegging" Simca automobiles to petitioner after its supply through Kurland was cut off. At length, petitioner was forced out of business.

Of course, the foregoing rendition of the operative facts in the case compresses a multitude of details into a highly generalized form of statement, but it is fully supported by the findings of the jury under Special Issues Nos. 1, 1(a), 2 and 3. (R. pp. 282, 283.)

The contextual facts of this case are more complex and not so much concerned with events and occurrences as with conditions in the domestic automobile industry during the period in question. The trial court excluded substantially all evidence offered by the petitioner to prove the business setting within which the foregoing operative events and occurrences

took place. (R. pp. 119-120, 124, 190.) The material thus offered and excluded is reflected in the accompanying printed record. (R. pp. 285-315.)

The business setting, in panorama, against which the petitioner contended that the operative facts of this case should be scrutinized, was a scene dominated by three gigantic figures engaged in manipulating a multitude of puppet-like lesser figures. And, although there were greater and lesser figures among the giants, even the least of them was a towering colossus when compared to the petitioner.

Plaintiff's Exhibit 41 (excluded) was an official publication of a report by the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate entitled "Study of Administered Prices in the Automobile Industry" and was dated November 1, 1958. Plaintiff's Exhibit 40 (excluded) was an official publication of a report by the same subcommittee made in connection with the "Automobile Dealers' Day in Court" bill. And, while the next preceding paragraph's characterization of the contents of such reports may be a bit picturesque, nonetheless it finds full support therein.

The material thus offered showed that at the time of the occurrences involved in this case: "[w]ith the possible exception of aluminum, the production of automobiles represent[ed] the Nation's most highly concentrated major industry." It was dominated by General Motors, Ford and Chrysler, with General Motors accounting for more than 50% of new car registrations in the first quarter of 1958. Price rivalry among the Big Three had largely been replaced

by non-price competition—principally advertising and model and design changes. Ford and Chrysler were careful to follow the pricing pattern set by General Motors; and General Motors set its prices by an elaborate statistical procedure based upon a target profit rate—basically the procedure of a public utility.

All three of the Big Three had developed their franchise systems in such manner that while their dealers "were ostensibly independent business men, the factory dominated and controlled their operations at all times." The "vast disparity in economic power and bargaining strength ha[d] enabled the factory to determine arbitrarily the rules by which the two parties conducted their business affairs."

Chrysler, caught in a lockstep with General Motors and Ford, contracted with Simca in such manner that it was brought into the lockstep march.

Petitioner contended that when viewed in the perspective of this business context the operative facts of this case would be regarded by the factfinders in an entirely different light from that which would exist in the absence of the contextual perspective. The trial court excluded the evidence as "irrelevant" and "hearsay". (R. pp. 119-120, 124, 190.)

Petitioner offered in evidence upon the trial the testimony of its officers as to the losses and injuries suffered by it together with reports by two certified public accountants, one of which was prepared by an accountant employed by Chrys-

ler and given full access to all petitioner's books and records. (Stipulation Exhibit No. 35*; R. p. 139.)

It was undisputed that during the period the petitioner operated its dealership under Kurland, it sold all Simca automobiles supplied to it at an average gross profit after commissions of $237.16 per unit and realized a total gross profit for the three-month period involved of $7,351.85. (Stipulation Exhibit No. 35, Schedule 1A, pp. 24 and 25.) It was also undisputed that after Chrysler ousted Kurland and petitioner from their respective positions, the petitioner's initial profit was converted to an ultimate overall net operating loss of $17,421.44 which fully exhausted the paid-in capital and surplus contributed to petitioner by its shareholders as well as the net operating profit accrued during its early operations. Petitioner also offered evidence tending to show that if it had not been for the conduct it complained of upon the part of Chrysler et al., in reasonable probability it would have continued in business for a period of at least five years, and would have been able to sell an average of 28 or more cars per month at an average profit after all selling, general and administrative expenses of $125.00 per unit and a cumulated net income before income taxes over the projected five year period totalling $229,517.60. (R. pp. 144-145, 182-183.) Plaintiff's Exhibit No. 72*. Other testimony to the same effect was adduced upon the trial but not included in the printed record.

Petitioner requested submission of the case to the jury upon liability issues under Sherman Act §1, Sherman Act §2 and Clayton Act §7. The requested form of charge is repro-

*Not included in printed record; but to be supplied with record on merits, having been certified to the Court of Appeals in original form.

duced in the printed record (R. pp. 83-101). The trial court refused to submit the liability issues under Sherman Act §2 and Clayton Act §7. (See colloquy between the trial judge and petitioner's counsel beginning near the bottom of R. p. 190 and continuing through p. 225.)

The case was submitted to the jury upon a liability issue under Sherman Act §1; and while the jury found the existence of the conspiracy alleged by petitioner, it found that it was not an unreasonable restraint of trade. (R. pp. 282-284.)

After they had deliberated several hours, the jury sent a written inquiry to the trial judge which was subsequently lost. The substance of the inquiry so made was: Since this was an antitrust case and the jury had answered Special Issue No. 4 "No", would it be necessary for the jury to answer Special Issue No. 5? The substance of the reply indorsed by the trial judge immediately below the inquiry was: That the matter inquired about had been covered by the instructions contained in the Charge of the Court and that no further instructions or interpretation were required. (R. p. 317.) Thereafter, when the verdict was returned, the damage issue was answered "None". (R. p. 284.)

The Court of Appeals has erroneously stated that the trial court "* * * required the jury by Special Issue No. 5 to ascertain the damages, if any, as a result of the *exclusive distributorship agreement inquired about in Special Issue No. 2.*" (See appendix p. 44.) This statement simply is not true as is unquestionably demonstrated by reading Special Issue No. 5. (R. p. 284.)

The Court of Appeals has also erroneously stated that: "No error of any kind is claimed which would impeach or affect the jury's verdict on that [damage] issue." (Appendix p. 42.) Throughout the briefs and arguments in the Court of Appeals the petitioner very vigorously claimed that both the exclusions of its evidence and the refusal to submit its case under its Sherman Act §2 and Clayton Act §7 therein, as well as the complete dismissal of its tortious interference count were rulings which clearly did prejudice petitioner. Petitioner's arguments in that respect are outlined hereinafter under Reasons for Granting the Writ. Yet the Court of Appeals has wholly failed to take notice of any of same in its opinion. The opinion also erroneously ignores the fact that the harmless error rule, as enunciated by this Court and other panels of its own court, is the obverse of that applied by it in this case. An error which relates to the substantial rights of the parties—especially when embodied in the charge to the jury—is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party.

The opinion of the Court of Appeals observes: "The plaintiff acted on the faith of Kurland's representation and has now filed suit in Dallas against Kurland for damages based on the claim that Kurland misrepresented its authority to give the plaintiff a Simca franchise." (Appendix p. 39.) Although immaterial, this recitation is incorrect. Such a suit was filed prior to the time a full investigation of the matter was completed but was dismissed upon the filing of the present action.

REASONS FOR GRANTING THE WRIT

In recent years the "niggardly" construction placed upon the substance of the antitrust law by some of the earlier judicial decisions has been rectified in large part by such decisions as *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. (2d) 741.* Yet, no matter how clear the substantive law may be, its purpose will be frustrated if niggardly procedural rulings prevent an adequate presentation of the plaintiff's case. If private enforcement of the antitrust law is to have the influence upon our societal organization that was intended by the Congress, then antitrust plaintiffs must be given a fair run for their money in the trial court. A trial judge, by narrowing the scope of the issues to be tried or by constricting the scope of the evidence to be admitted, can nullify the substantive law just as effectively as a repeal by an Act of Congress. A plaintiff whose mouth is shut cannot make known his plaint.

The burden of proof in an antitrust case is heavy and complex. As a result, in antitrust litigation even a modest handicap can be decisive. The deep pocket makes for enormous advantage and in private litigation is almost invariably upon the side of the antitrust defendant. If, added to this, the plaintiff is confronted with antipathetic prepossessions (conscious or unconscious) upon the part of the trial judge, a decisive handicap can be expected in a high percentage of private enforcement cases. Perhaps this accounts for the rather poor record of private enforcement as an instrument

for effectuating antitrust policy. How many trial judges on the federal bench have come from backgrounds where the antitrust law was looked upon with enthusiastic approval?

This case is important because it draws into sharp focus several vital procedural and evidentiary problems that must be dealt with in the trial of an antitrust case. It also brings into sharp focus the need for this Court to supply a definitive analysis of §2 of the Sherman Act sufficient to enable instructions to a jury to be formulated in terms that will furnish to a layman a sound distinction between the conduct prohibited by it and that prohibited by §1. The petitioner believes it has constructed such an analysis based upon Mr. Holmes' article, *Privilege, Malice and Intent*, 8 Harvard Law Review 1, and Justice White's opinion in *Standard Oil Company of New Jersey v. United States, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619.*

The Court of Appeals has disposed of this case without passing upon any of the important questions involved, by taking the position that: "The jury's answer [to the damage issue], therefore, established that plaintiff sustained no damage under any legal theory which it had asserted." Immediately following this premise, it holds: "That finding forecloses the plaintiff from any relief on any theory * * *" and: "* * * It precludes a ruling on plaintiff's 'Fourth Point' directed to the exclusion of plaintiff's Exhibits 40 and 41 which *are relevant* [emphasis supplied] to the existence of an unreasonable restraint of trade or commerce and not to the question of damages."

The first trouble with these statements lies in the fact that the premise for the holding is, in turn, based upon and immediately preceded by a patently incorrect statement of what the trial court "required the jury by Special Issue No. 5 to ascertain". Again, please compare the statements in the opinion (Appendix p. 44) with the text of Special Issue No. 5 (R. p. 284).

The second trouble is that if the jury had been permitted to consider Exhibits 40 and 41 they might well have answered the unreasonableness issue (Special Issue No. 4) "Yes" and then gone on to the question of damages (Special Issue No. 5) unperplexed by the effect of their answer to Special Issue No. 4 upon the matter inquired about in Special Issue No. 5.

In the light of the jury's note to the trial judge (R. pp. 316-317), can it be said with any real degree of assurance that it appears from the record as a whole that the four erroneous rulings of the trial judge complained of by petitioner were *harmless* and did *not* prejudice petitioner?

In principle, certainly, the decision of the Court of Appeals in this case clearly is in conflict with the following decision of this Court:

In *United States v. River Rouge Improvement Co., 269 U. S. 411, 421; 46 S. Ct. 144, 148; 70 L. Ed. 339,* the Court pointed out the distinction to be made between harmless and prejudicial error. At the time of the *River Rouge* case, the harmless error provisions of present Rule 61, FRCP, were incorporated in Section 269 of the Judicial Code, as amended.

Discussing the provisions of such section of the Judicial Code, the Court stated:

> "[9] The present case is not controlled by the provision of section 269 of the Judicial Code, as amended by the Act of February 26, 1919, that in an appellate proceeding judgment shall be given after an examination of the entire record, 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' We need not enter upon a discussion of the divergent views which have been expressed in various Circuit Courts of Appeals as to the effect of the Act of 1919. It suffices to say that since the passage of this Act, as well as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties —especially when embodied in the charge to a jury— is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party. See Yazoo Railroad v. Mullins, 249 U. S. 531, 533, 39 S. Ct. 363, 63 L. Ed. 754; Fillippon v. Albion Slate Co., 250 U. S. 76, 82, 39 S. Ct. 435, 63 L. Ed. 853. *In the present case the error in the charge could not but mislead the jury in reference to a material element necessary for its consideration in determining the amounts of the awards;* and it cannot be said from the whole record that the substantial rights of the United States were not prejudiced thereby," 269 U. S. 421, 46 S. Ct. 147, 148. (Emphasis supplied.)

In *Williams v. Great Southern Lumber Co., 277 U. S. 19, 26; 48 S. Ct. 417-419*, the Court made clear that this same principle applied to the rulings of the trial court on the admission and exclusion of evidence as well as to instructions given the jury. The Court stated:

> "[3] 3. The judgment was properly reversed on account of these errors. This was not affected by the pro-

> vision of §269 of the Judicial Code, as amended in 1919, after the examination of the entire record, 'without regard to technical errors, defect, or exceptions which do not affect the substantial rights of the parties.' The errors in the exclusion and admission of evidence directly affected the substantial rights of the Company. Since the passage of this act, as well as before, an error which related, not to merely formal or technical matters, but to the substantial rights of the parties 'is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party'." 277 U. S. 26, 48 S. Ct. 419.

The decision of the Court of Appeals in this case also appears to be in clear conflict in principle with a recent decision by another panel of the same court. There the court was giving consideration to the prejudicial effect of rulings of the trial court upon the exclusion of evidence. *Thermo-King Corporation v. White's Trucking Service, Inc., 5 Cir. 1961, 292 F. 2d 668.* The opinion therein, by Judge Brown, points out that:

> "It is sufficient if in context the evidence excluded has such persuasiveness that it might have led to a different result."

The very crux of petitioner's case under Sherman Act §1 is this: That whereas it may well be reasonable to allow manufacturers to establish exclusive distributors and dealers for their wares, in order that new entries into the market may be promoted and facilitated: the Chrysler-Simca combination in this case is not reasonable and therefore, unreasonable, because it involves the destruction of an already established independent distributor-dealer network and places dis-

tribution of Simca products under the direct control of a trade-restraining member of an industry-dominating oligopoly.

The petitioner sought to show by Plaintiff's Exhibit 40 that the members of that oligopoly have established such thorough control of their dealers, that their dealers actually have no real measure of independence or freedom and cannot conduct their business with the sort of individual resourcefulness which is thought to be so valuable in a free enterprise system.

The lack of independence for Big Three dealers is the entire subject matter of Plaintiff's Exhibit 40. Unquestionably, therefore, the matters therein shown have such persuasiveness that they *might* have led to a different result.

By Plaintiff's Exhibit 41, petitioner sought to show:

(1) The unreasonableness of the restraint of trade charged under Sherman Act Section 1.

(2) The power possessed by Chrysler which it could (and did) use to drive out and exclude petitioner from a part of the trade and commerce among the several states and with foreign nations.

(3) The reasons why the effect of Chrysler's acquisition of the Simca stock may be substantially to lessen competition—or tend to create a monopoly in the automobile line of commerce in the United States generally and therefore in Dallas County, Texas.

Plaintiff's Exhibit No. 41 makes exposition of the following matters:

That Chrysler is one of the Big Three in the domestic automobile industry.

That there has been a long term trend of increasing concentration in the automobile industry.

That in 1958, the Big Three accounted for 95% of all domestic automobile production.

That there is virtually no genuine price rivalry among the Big Three and that in this regard the Big Three virtually epitomize the "problem" to which the 1950 amendment of Clayton Act Section 7 was directed.

That prices among the Big Three are so administered as to yield a "target" profit arbitrarily arrived at by General Motors; and that the "market" has very little influence on such prices.

That styling among the Big Three has come to be heavily influenced by the style leadership of General Motors, creating a condition that is inimical to innovation.

Certainly, it is a logical and reasonable inference to say that the policies and practices shown by Exhibit 41 to be followed by the Big Three may well be extended to this new competitor in the American market as a result of the Chrysler-Simca combine. And no less certainly is it a logical and reasonable inference (although perhaps not a necessary inference) to say that the extension of such policies and practices constitutes an unreasonable restraint of trade, tends substantially to lessen competition and tends to create a monopoly. Clearly, the jury *might* have been persuaded to render a different verdict had these matters been before it.

It is also a logical and reasonable inference to say that even the smallest member of the Big Three is invested with enormous power and a singularly strategic position in the event it should purpose or intend to drive out and exclude genuinely competitive newcomers into the domestic automobile market.

Moreover, the authorities are almost innumerable which hold it to be prejudicial error for the trial court erroneously to dismiss a complaint under Rule 12(b) FRCP, "for failure to state a claim upon which relief can be granted." A massive collection of authorities on this point is found in *2 Moore's Federal Practice, page 2245, under footnote 6.* A recent case there cited which was decided by Fifth Circuit court is *Millet v. Godchaux Sugars, Inc., 5 Cir. 1957, 241 F. 2d 264.* The opinion quotes from an earlier case also by that court, *Des Isles v. Evans, 200 F. 2d 614, 615,* and lays considerable emphasis upon the point that under the federal practice:

> "* * * a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claims."

No such certainty exists in this case with regard to the Second Count of the petitioner's complaint wherein it sought its common law tort recovery against Chrysler Corporation.

The petitioner says there are numerous factors in this case which demonstrate, almost beyond dispute, that the jury's verdict was affected to the petitioner's prejudice by the rulings of the trial judge of which the petitioner makes complaint.

Even upon the one cause of action that the trial court did submit, the petitioner was seriously prejudiced in a vital part of its case by the trial court's refusal to admit evidence as to the oligopolistic conditions existing in the automobile industry which made Chrysler's control and domination of the marketing of Simca products an unreasonable restraint of trade.

It was upon this very issue that the jury turned against the petitioner. All prior findings had been in the petitioner's favor. And there cannot be the slightest doubt whatever that the jury's finding against the petitioner upon this liability issue affected its consideration of the damage issue. Otherwise, why would they have sent the note to the judge asking the effect of their answer to the liability issue upon the damage issue?

Had the petitioner been permitted to proceed with its Second Count asserting a common law interference then there would have been a liability issue under which the jury could have found the existence of an *unjustified interference* by Chrysler with the appellant's trade and business. The damage issue would have then called upon the jury to fix the sum of money that would fairly and reasonably compensate the plaintiff for the damage sustained by it as a proximate result of either the unjustified interference, if any, or of the conspiracy, if any, that the jury might have found to exist.

Had there been submitted the petitioner's interference theory and the two additional sets of antitrust liability issues requested by the petitioner, then there would have been a

total of five liability issues, a "Yes" answer to any one of which would have obviated the jury's perplexity over the damage issue. This is because there were two liability issues under the monopolization theory: one as to whether Chrysler (alone) monopolized and the other as to whether Chrysler, et al., in combination and conspiracy monopolized. The petitioner's requested instructions and issues are shown at pp. 83 through 101 of the printed transcript. The requested issues as to monopolization appear as requested issues Nos. 5 through 7; and the issue under Clayton Act §7 appears as requested Issue No. 8 (R. p. 100).

That the jury's confusion and perplexity over the effect of its answer to the liability issue prejudicially affected its finding under the damage issue is also demonstrated by the fact that the existence of some damage was undisputed and affirmatively reflected by Stipulation Exhibit No. 35. This exhibit is the Special Report covering the operations of the petitioner for the period ended August 31, 1959, prepared by a certified public accountant who was hired by Chrysler's attorneys and given full access to all of the petitioner's books and records. (R. p. 139.)

To properly submit the case under all of petitioner's theories, that is, under the tort cause, under both §1 and §2 of the Sherman Act and under §7 of the Clayton Act it would have been necessary that the damage issue refer to the causes for action defined by the common law and by each of those statutory provisions. The issue would call for the jury to fix the damages proximately resulting from:

(1) the unjustified interference, if any, inquired about in Special Issue No. ; or

(2) the unreasonable restraint of trade, if any, inquired about in Special Issue No. ; or

(3) the monopolization by Chrysler, if any, inquired about in Special Issue No. ; or

(4) the combination to monopolize, if any, inquired about in Special Issue No. ; or

(5) the acquisition of stock inquired about in Special Issue No. ; or from all or any combination of one or more of such causes.

It may be that a proper general reference could be framed that would comprehend all of such causes for action; but, in any event, to be proper, the issue would have to call upon the jury to fix the damages resulting from any one or more of the causes that they had found to exist.

Petitioner says that in the light of the foregoing considerations, the holding of the Court of Appeals was clearly wrong and that it cannot properly be said that it appears from the record as a whole that the errors of which petitioner complains were "* * * harmless and did not prejudice the rights of the complaining party."

The opinion of the Court of Appeals observes that: "The plaintiff filed no motion for new trial in the district court, and makes no complaint on appeal as to the sufficiency of the evidence to sustain the verdict of the jury." Although this observation apparently forms no part of the basis for its holding we hasten to point out that it could not properly serve as such in any event. A motion for new trial is not a necessary predicate to an appeal under the Federal Rules of Civil Procedure; and a new trial under the same rulings made in the first trial would have been a waste of time. It

was first necessary that petitioner seek a review of the rulings of the trial court which it regarded as being improper and as having adversely affected the jury's verdict. It was neither necessary nor proper that the petitioner make a direct attack upon the verdict. As pointed out by Judge Hutcheson in *Baten v. Kirby Lumber Corporation, 5 Cir., 1939, 103 F. 2d 272, 274,* "Federal appellate courts do not directly review jury verdicts but only rulings of the judge which may have affected the verdict." See also *First Unitarian Society of Chicago v. Faulkner, 91 U. S. 415, 423; 23 L. Ed. 283,* and *Luther v. Maple, 8 Cir., 1958, 250 F. 2d 916.*

If the rulings of the trial judge were such as, considered in the light of reason and experience, probably affected the jury's verdict to the prejudice of the petitioner, then it is the appellate court's duty to reverse and remand the case for a new jury to pass on.

To aid the exposition of what seems to it a compelling reason for granting the writ in this case petitioner turns once more to the article written (long prior to his service upon the Supreme Court) by Mr. Justice Holmes, *Privilege, Malice, and Intent, 8 Harvard Law Review 1, 9:*

> "Behind all is the question whether the courts are not flying in the face of the organization of the world which is taking place so fast, and of its inevitable consequences. I make these suggestions, not as criticisms of the decisions, but to call attention to the very serious legislative considerations which have to be weighed. The danger is that such considerations should have their weight in an inarticulate form as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a

> judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies."

It seems beyond question that the antitrust law deals with the very crux of the problem of adjusting the conflicts which arise in our society between the interests of the individual and the interests of the collective group. The reasonableness or unreasonableness of any given restraint of trade (and every agreement restrains, binds trade in some measure) involves just such considerations as those spoken of by Justice Holmes; and requires a balancing of the interests of the individual against those of the group. It also seems beyond question that the "organization of the world which [was] taking place so fast" in 1895 when these words were first published, now is proceeding at a startlingly accelerated rate.

This case has provided the occasion for petitioner and its counsel to become acquainted with at least some of the many and varied implications of the emergence of the business corporation as one of the most significant, if not the most significant, institution of our time. There can be no doubt that the destiny of the western world is closely bound up with the destiny of the business corporation. In some of their far-flung international operations, the modern business corporation develops a loyalty upon the part of its employees that transcends national boundaries.

Neither can there be doubt that the business corporation has some striking similarities to the institutions by and through which socialist regimes organize their industrial efforts—as well as some very important differences. A man observing a Russian industrial collective would observe not only similarities in the tasks of the workers but similarities in the hierarchies of authority progressing up to a small group called a board of directors on the one hand and a committee on the other. Even the differences in the incidents of ownership involved in "private" and "public" systems have become somewhat less clear.

Beyond all, we have been deeply impressed by the intensity of public interest that has been manifested in the accelerating development of the business corporation as an institution of leading importance in our society. We append hereto a bibliography which will serve to point up this interest as well as some profoundly difficult problems.

We confess to being old-fashioned: at least to the extent that we hope the day will never come in this country when the interests of the collective group will be regarded, simply as a matter of course, as outweighing the interests of the individual. We recognize, of course, that there are many instances in which the commonweal has been and must be held to be of superior importance to the interests of the individual.

For a simile we think appropriate here, we recall that during World War II the saving of gasoline was encouraged by a slogan formed into a question: "Is this trip really necessary?" We think a paraphrase of this question might well be appropriate for the courts to employ in their consideration

of cases such as the present one. Wherever consideration is being given to the sacrifice of the interests of the individual to the interests of the collective group, let it be asked, "Is this sacrifice really necessary?"

The rulings of the trial court and of the court of appeals have prevented any real consideration of this question as it is presented in the facts of this case. We submit that this Court should reverse the decisions below and remand the case for new trial under such conditions as will insure that the real issues involved be candidly posed and fully debated. Petitioner recognizes that when the real issues are thus posed and debated it may still lose; but it is superlatively important to the jurisprudence of the country as a whole that this Court declare its insistence that the real issues be reached; and that instead of an exercise in pettifoggery, the antitrust law be treated as it was intended by the Congress: "* * * a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies."

CONCLUSION

WHEREFORE, the petitioner respectfully prays that the Court issue its Writ of Certiorari to review the judgment of the court below herein.

Respectfully submitted,

W. B. HARRELL,
1520 Republic National Bank Building,
Dallas 1, Texas,
Attorney for Petitioner.

Of Counsel:
FRED S. ABNEY,
1520 Republic National Bank Building,
Dallas 1, Texas.

PROOF OF SERVICE

THE STATE OF TEXAS)
COUNTY OF DALLAS)

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared Fred. S. Abney, who being by me duly sworn upon oath stated: I, Fred S. Abney, am not a member of the bar of Supreme Court of the United States; but I am a duly licensed and practicing attorney and a member of the State Bar of Texas and have been the attorney of record for petitioners herein in all proceedings had in the courts below.

I do hereby state upon oath that on the 19th day of December, 1962, I served copies of the foregoing petition for writ of certiorari on the respondents by making personal delivery, at the office of the following named counsel of record in the courts below, to counsel or a clerk therein, to-wit:

Mr. Pinkney Grissom
Mr. William H. Neary
Mr. Jerry L. Buchmeyer
Thompson, Knight, Wright & Simmons
2300 Republic Bank Building
Dallas 1, Texas
Attorneys for Chrysler Corporation and
Chrysler Motors Corporation

Mr. George S. Terry
Mr. James R. Rodgers
Turner, Rodgers, Winn, Scurlock & Terry
Republic National Bank Building
Dallas 1, Texas
Attorneys for Simca, S. A. of France, Simca, Inc.,
and C. S. Hamilton Motor Company.

I further state upon oath that upon the 19th day of December, 1962, I also served copies of the foregoing petition for writ of certiorari on the respondents, Chrysler Corporation and Chrysler Motors Corporation, by depositing the same in a United States post office or mail box, with air mail postage prepaid, addressed to the following counsel of record in the courts below, at their respective postoffice addresses, to-wit:

Mr. Keith A. Jenkins
c/o Chrysler Corporation
Detroit, Michigan.

Mr. Frederick T. Shea
Kelly, Drye, Newhall & Maginess
70 Broadway
New York 4, New York
Attorneys for Chrysler Corporation and
Chrysler Motors Corporation.

Fred S Abney

SWORN TO AND SUBSCRIBED before me by the said Fred S. Abney this the 19th day of December, 1962.

Mary M Ferrell

Notary Public in and for
Dallas County, Texas.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19235

GORHAM & JOHNSON, INC.

Appellant,

versus

CHRYSLER CORPORATION, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(September 25, 1962)

Before HUTCHESON, RIVES and BELL, Circuit Judges.

RIVES, Circuit Judge: The plaintiff, Gorham & Johnson, Inc., sued the defendants, Chrysler Corporation, et al., claiming that the plaintiff had been injured in its business or property[1] by reason of the defendants' violations of the antitrust laws of the United States.[2] The second count of

[1]Specifically, that its business in Dallas, Texas, for retail dealing in Simca automobiles had been destroyed.

[2]The pertinent provisions of the antitrust laws governing the case as submitted to the jury read as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C.A. §15.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal * * *." 15 U.S.C.A. §1.

the complaint asserted a right to recover against Chrysler alone for the common-law tort designated by plaintiff as "Interference with Relational Interests."[3] Prior to the trial, the district court dismissed this second count. Plaintiff's brief concedes, however, that the tort action was grounded "upon precisely the same facts alleged in support of the antitrust violations."[4] The district court also refused to submit to the jury the plaintiff's requested instructions and special issues as to claimed violations of Section 2 of Title 15,[5] and of Section 18 of Title 15,[6] United States Code. The court submitted the plaintiff's claims under section 1 of Title 15, United States Code (see n. 2, supra), to the jury upon special issues. The jury returned its verdict as follows:

> "Special Issue No. 1: Do you find from a preponderance of the evidence that during the twelve-month period beginning in August of 1958, the plaintiff had

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[3] Upon the general principle stated in 4 Restatement of Torts, Section 766, as follows:

> "* * * one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby."

[4] The complaint alleged:

> "This Honorable Court has jurisdiction of this Second Count of plaintiff's complaint because the factual circumstances supporting the ground for relief herein asserted are identical with the factual circumstances supporting the federal ground for relief asserted in First Count."

[5] In pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade of commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *" 15 U.S.C.A. §2.

[6] In pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C.A. §18.

an intention and was prepared to enter a business in Dallas for retail dealing in Simca automobiles manufactured in France by French Simca and distributed in the Dallas area by Kurland Motors of Denver, Colorado?

"Answer 'Yes' or 'No'.

"Answer: Yes.

"Special Issue No. 1(a): Do you find from a preponderance of the evidence that during the twelve-month period beginning in August of 1958 the plaintiff actually established a business in Dallas for retail dealing in Simca automobiles manufactured in France by French Simca and distributed in the Dallas area by Kurland Motors of Denver, Colorado?

"Answer 'Yes' or 'No'.

"Answer: Yes.

"Special Issue No. 2: Do you find from a preponderance of the evidence that in July of 1958 Chrysler entered into a contract, combination or conspiracy with H. T. Pigozzi and French Simca in which it was agreed that Chrysler would be the sole and exclusive distributor for Simca products in the United States and that all parties to such contract, combination or conspiracy would refuse to deal with any other distributor or dealer in Simca products in the United States unless Chrysler approved or consented thereto?

"Answer 'Yes' or 'No'.

"Answer: Yes.

"If you have answered Special Issue No. 2 'Yes,' and only in that event, then answer the following Special Issue No. 3.

"Special Issue No. 3: Do you find from a preponderance of the evidence that from time to time after July of 1958 the following parties joined in and became a part of the contract, combination or conspiracy in-

quired about in Special Issue No. 2, if any you have found?

"Answer 'yes' or 'no' as to each party:

"Chrysler International, S.A.—Answer: Yes.

"Chrysler Motors—Answer: Yes.

"Simca, Inc.—Answer: Yes.

"Simca Western Division, Inc.—Answer: Yes.

"Kurland Motors—Answer: Yes.

"C. S. Hamilton Motor Company—Answer: Yes.

"Boedeker-Verner Motors—Answer: Yes.

"Plymouth Park Motors, Inc.—Answer: Yes.

"O. R. Mitchell Motors—Answer: Yes.

"Ira Young Auto Co., Inc.—Answer: Yes.

"If you have answered Special Issue No. 2 'Yes' and only in that event, then answer the following Special Issue No. 4.

"Special Issue No. 4: Do you find from a preponderance of the evidence that the contract, combination or conspiracy inquired about in Special Issue No. 2, if you have found same to exist, was an unreasonable restraint of trade or commerce among the several states or with foreign nations, as these terms have been explained to you in this charge?

"Answer 'Yes' or 'No.'

"Answer: No.

"Special Issue No. 5: What sum of money, if any, would fairly and reasonably compensate the plaintiff for the damage, if any, sustained by him as a direct and proximate result of the conspiracy, if you have found same to exist?

"Answer by stating the amount in dollars and cents.

"Answer: None."

From the judgment for the defendants entered upon that verdict, the plaintiff appeals, urging four claimed errors as follows:

"FIRST POINT

"The district court erred in dismissing Second Count of appellant's fourth amended complaint.

"SECOND POINT

"The district court erred in refusing to submit to the jury appellant's requested instructions and special issues regarding appellant's claims of monopolization by the defendant Chrysler standing alone and by the several defendants in combination in violation of Section 2 of the Sherman Act.

"THIRD POINT

"The district erred in refusing to submit to the jury the appellant's requested instructions and special issue regarding the appellant's claim that the effect of Chrysler's acquisition of twenty-five percent (25%) of French Simca's stock may be substantially to lessen competition or to tend to create a monopoly in the automobile line of commerce either in the United States generally or in Dallas County, Texas, in violation of Section 7 of the Clayton Act.

"FOURTH POINT

"The district court erred in excluding from evidence the appellant's Exhibits 40 and 41, being official publications of United States Senate Committee Reports describing the high degree of concentration in the American automobile industry, the domination and abuse of dealers by manufacturers, and the administered pricing policies and parallel practices with respect to design, styling and marketing that obtain within the industry and in excluding the testimony of the same character offered by appellant's witnesses."

The plaintiff claims that the destruction of its business as a retail dealer in Simca automobiles was brought about by Chrysler's acquisition of some 25% of the capital stock of Simca, S.A. of France (hereafter referred to as French Simca), and by the resultant agreement under which Chrysler became the exclusive importer and distributor of Simca automobiles in the United States. In July 1958, Chrysler and H. T. Pigozzi, head of a group owning approximately 40% of the outstanding stock of French Simca, entered into an agreement referred to as the "Basic Agreement" on behalf of Pigozzi's group of stockholders and on behalf of French Simca. The agreement was executed by Pigozzi in Paris on July 21 and by Chrysler in Detroit on August 1. Chrysler agreed to acquire all the stock of French Simca then owned by Ford Motor Company, consisting of approximately 15% of the outstanding stock of French Simca, and to purchase an additional 10% of such stock, so that Chrysler would then own 25% of the stock of French Simca and Pigozzi's group would own 30%, and such respective holdings would not be changed except by mutual agreement. Two directors nominated by Chrysler were to be elected to the Board of Directors of French Simca. There was attached to the Basic Agreement as Exhibit "B" a form of distribution agreement for Simca products and for Chrysler products, under which Chrysler became the sole importer and distributor of Simca automobiles in the United States. The written distribution agreement was executed on September 22, but effective September 1, 1958.

Execution of the Basic Agreement was publicly announced throughout the Country and received wide public-

ity in the Dallas newspapers early in August, including the understanding that Chrysler "is becoming the sole distributor of Simca products in the United States."

Prior to the execution of the Basic Agreement, French Simca advised Chrysler that the agreements with Simca distributors in the United States were terminable at will by either party. On September 2, 1958, the day it commenced operations as the exclusive Simca distributor in the United States, Chrysler directed a letter to the ten Simca distributors in the United States and a letter to the Simca dealers of those distributors. The letter to the Simca distributors advised them that beginning September 2, 1958 Chrysler had assumed the responsibility for the distribution of Simca products in the United States. In it, Chrysler indicated that, in order to transfer the distribution functions in a smooth and orderly fashion and to permit the distributors to wind up their affairs in the most favorable manner under the circumstances, the distributors would be granted the opportunity to order Simca automobiles based on their previous commitments through December 1958. The letter also stated that since the Simca distributors were probably interested in continuing to sell Simca products at retail, the appropriate Simca Area Sales Manager at Chrysler Motors would contact the distributors to discuss this matter.

The letter of September 2, 1958 to the Simca dealers advised them that Chrysler had assumed responsibility for distribution of Simca products in the United States; that Chrysler Motors had offered to arrange for shipments of Simca cars to the ten distributors, according to their com-

mitments, through December of 1958; and that they should order automobiles from their distributor through that date. This letter further stated that:

> "*If you desire to continue as a Simca dealer, you should apply to this office.* Your qualifications will be carefully and thoroughly reviewed and considered. However, this letter should in no way be considered a commitment to enter into an agreement with you as a Simca Dealer." (Emphasis added.)

The importation and distribution of Simca products in the United States began in 1957 and were originally handled by Simca, Inc., incorporated under the laws of Delaware, a wholly owned subsidiary of French Simca. In May 1957, Simca, Inc., and Kurland Motors of Denver, Colorado, entered into a Distributor Sales Agreement for Simca Cars, under which Kurland Motors became the distributor for 14 states including Texas. This agreement was terminable by either party upon six months' notice. In February 1958, French Simca changed its American distribution systems and appointed two new wholesalers. Simca, Inc. notified its distributors, including Kurland Motors, that "all franchises which we at present have with you are cancelled, effective in accordance with the terms of our agreements." Simca Western Division, Inc., which then had charge of the importation and distribution of Simca products in states west of the Mississippi River, wrote all distributors, including Kurland Motors, that it was "prepared to sell you these cars and spare parts at the established prices and under terms of payment as practiced in the past, pending negotiation of a new franchise agreement." No formal new franchise agreement was executed with Kur-

land Motors, but it continued to act as the Simca distributor in Texas.

Following the public announcement in August 1958 that Chrysler was becoming the sole distributor of Simca products in the United States, Kurland Motors took the position that it was entitled to reasonable but not less than six months' notice of the termination of its exclusive rights to distribute Simca cars. Eventually, however, by agreement dated November 28, 1958, Kurland Motors accepted the termination of its Simca distributorship.

Paul R. Gorham and L. H. Johnson, Jr., had been employees of Ranes Motors, Inc., w ich had been appointed by Kurland Motors as the franchise dealer for the sale of Simca automobiles and parts in Dallas. Ranes Motors continued as the franchise Simca dealer in Dallas during the first eight months of 1958, that is, through August of 1958, when it ceased operations. Meanwhile, its two employees Gorham and Johnson had negotiated for the Simca dealership which it was relinquishing. On August 13, 1958 they incorporated the plaintiff corporation and placed property in it of the value of $1,000.00. Their total ultimate contribution to capital came to either $10,589.00 or $11,789.00.

Gorham and Johnson had read the newspaper announcements in August that Chrysler was assuming the exclusive Simca distribution in the United States. However, on August 29, 1958 a representative of Kurland Motors told them that Kurland was still the distributor for Simca cars and that Chrysler's connection would be of no importance to them. The plaintiff acted on the faith of Kurland's repre-

sentations and has now filed suit in Dallas, against Kurland for damages based on the claim that Kurland misrepresented its authority to give the plaintiff a Simca franchise. On August 29, 1958 plaintiff executed an application for franchise to Kurland Motors and a form of Dealer Sales Agreement terminable by either party upon 30 days' written notice. Plaintiff received its first shipment of cars from Kurland Motors on September 4, 1958.

Plaintiff received from Ranes Motors its copy of Chrysler's letter dated September 2, 1958, addressed to all Simca dealers, and stating in part:

> "If you desire to continue as a Simca dealer, you should apply to this office. Your qualifications will be carefully and thoroughly reviewed and considered. However, this letter should in no way be considered a commitment to enter into an agreement with you as a Simca dealer."

The plaintiff never made application to Chrysler. Mr. Johnson testified: "We didn't want a contract with Chrysler." Moreover, the plaintiff made no effort to get any other dealership.

During September and October 1958, plaintiff purchased a total of 31 Simcas from Kurland Motors. In November Kurland advised the plaintiff that it had moved its inventory of Simca cars from Galveston, Texas, the port of entry, to Denver, Colorado. This change would require plaintiff to pay freight from Galveston to Denver and from Denver to Dallas, an increase of over $100.00 per car purchased from Kurland Motors. Mr. Gorham testified that plaintiff quit dealing with Kurland because of this increase. On Novem-

ber 28, 1958, plaintiff was notified by telephone that Kurland had entered an agreement with Chrysler and would no longer be a distributor. On December 8, 1958 Kurland formally notified plaintiff of the termination of its dealer sales agreement, 30 days after receipt of notice.

Plaintiff continued in business as an unfranchised dealer securing Simca cars for resale by buying them from franchised dealers, or as, what is known in the colorful term of the automobile industry, a "bootleg dealer." As such, it had to provide the franchised dealer a profit of from $50.00 to $70.00 per car. There is evidence that when one of the franchised dealers objected to this "bootlegging" operation, Chrysler brought pressure to have it stopped. There was, however, no separate complaint for the alleged destruction of plaintiff's business as a "bootleg" Simca dealer. Instead, plaintiff contended and the jury found that, by refusing to deal with the plaintiff, each of the franchised dealers joined in and became a part of the Basic Agreement under which Chrysler become the sole distributor of Simca products in the United States. The plaintiff evidently did not consider it worthwhile to charge a separate conspiracy to destroy its business as a "bootleg dealer," for Mr. Gorham frankly conceded that "it would be pure speculation to attempt to say what Gorham & Johnson would have made had they continued as bootleg dealers or would have made buying cars at bootleg from other dealers." In the early part of 1959 plaintiff "decided to liquidate and go out of business."

We have sketched only a few of the salient facts developed in this complicated case, but enough, we believe, to show that the jury's verdict on Special Issue No. 5 was amply justified.

The failure of plaintiff's business as a retail dealer in Simca automobiles could reasonably have been believed by the jury to have resulted from any one of numerous causes. Inad quate capitalization, plaintiff's failure and refusal to apply to Chrysler for a dealership, its failure to seek a dealership in any other cars, the increase of freight charges by Kurland, and Kurland's alleged misrepresentation of its authority are but a few of the possible causes of plaintiff's loss.

The plaintiff filed no motion for new trial in the district court, and makes no complaint on appeal as to the sufficiency of the evidence to sustain the verdict of the jury. Plaintiff's "Fourth Point" on appeal directed to the exclusion from evidence of its Exhibits 40 and 41, official publications of United States Senate Committee Reports, might go to whether the defendants actually violated the antitrust laws or to the jury's answer to Special Issue No. 4 that the contract, combination or conspiracy was not an unreasonable restraint of trade or commerce. The exclusion of those exhibits does not go to the question of whether the plaintiff was damaged as the result of the contract or conspiracy. No error of any kind is claimed which would impeach or affect the jury's verdict on that issue. It follows that the verdict must be accepted as conclusively establishing that the plaintiff was not damaged as the result of the contract, combination or conspiracy referred to in Special Issue No. 2.

Actually, while the word "conspiracy" sounds sinister, it was used in this case as synonymous with "contract." As explained in the court's charge to the jury: "a conspiracy—and—'contract,' 'combination' or 'conspiracy' mean essentially the same thing in this case—is an agreement between two or more persons shown either by words or by deeds." Special Issue No. 2 could be answered only in the affirmative, for there was no dispute about the contract in which it was agreed that Chrysler would be the sole distributor for Simca products in the United States.

Every legal theory asserted by the plaintiff—the common-law tort in Count 2; the claimed violations of Sections 2 and 18 of Title 15, United States Code, which the district court declined to submit to the jury; as well as the claimed violation of Section 1 of Title 15, as to which the jury found that there was no unreasonable restraint of trade or commerce—each and all of these legal theories depend for their validity upon the plaintiff's having sustained damage as the result of the contract by which Chrysler became the sole distributor for Simca products in the United States.

The breadth of Special Issue No. 5 is pointed up by what occurred during the course of the jury's deliberations as disclosed by a stipulation in the record:

> "• • • that during the course of the proceedings had upon the trial on the merits of the above cause and after the jury had received the charge of the Court and retired to the jury room but prior to the time it returned its verdict, the foreman of the jury addressed a written inquiry to the Judge which was delivered to him in due course by the deputy marshal. After calling

in and consulting with counsel for all parties, the Judge indorsed upon a lower part of the same paper bearing the inquiry his response thereto and thereafter in due course the paper containing the inquiry and the response was delivered by the deputy marshal to the foreman of the jury.

"Prior to directing the deputy marshal to return such inquiry and his response, the district Judge read both the inquiry and the response to counsel for all parties and no objection was made upon the part of any party, and all parties agreed to the action of the Court.

"The paper containing the inquiry made by the jury and the response of the Judge thereto has been lost or misplaced and is not available for inclusion in the record on appeal of this cause.

"The substance of the inquiry so made was: since this was an antitrust case, whether it would be necessary for the jury to answer Special Issue No. 5 inasmuch as the jury had answered 'no' to Special Issue No. 4.

"The substance of the reply indorsed by the Judge immediately below such inquiry was: that the matter inquired about had been covered by the instructions contained in the charge of the Court and that no further instructions or interpretation was required."

The district court carefully refrained from restricting Special Issue No. 5 to the particular claim which it submitted to the jury based on a violation of Section 1, Title 15, United States Code. Instead, the court required the jury by Special Issue No. 5 to ascertain the damages, if any, as a result of the exclusive distributorship agreement inquired about in Special Issue No. 2. The jury's answer, therefore, established that the plaintiff sustained no damage under any legal theory which it had asserted.

That finding forecloses plaintiff from any relief on any theory of violation of the antitrust laws, for a private suit under those laws is permitted only by "a person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C.A. § 15. It demonstrates that any possible error in dismissing the second count of the complaint claiming for a common-law tort "upon precisely the same facts alleged in support of the antitrust violations" would be error without injury. It precludes a ruling on plaintiff's "Fourth Point" directed to the exclusion of plaintiff's Exhibits 40 and 41 which are relevant to the existence of an unreasonable restraint of trade or commerce and not to the question of damages.

It results that none of the four claimed errors can amount to reversible error, and the judgment is

AFFIRMED.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs., Inc., N. O., La.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

(Seal)

By Clara R. James
Deputy Nov. 3 1962
New Orleans, Louisiana

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19235

D. C. Docket No. 8221 Civil

GORHAM & JOHNSON, INC.

Appellant,

versus

CHRYSLER CORPORATION, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before HUTCHESON, RIVES and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Gorham & Johnson, Inc., be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

September 25, 1962

Issued:

STATUTES INVOLVED

Sherman Act § 1, 15 U.S.C.A. § 1

> § 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment

or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. As amended July 7, 1955, c. 281, 69 Stat. 282.

Sherman Act § 2, 15 U.S.C.A. § 2

§2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. As amended July 7, 1955, c. 281, 69 Stat. 282.

Clayton Act § 4, 15 U.S.C.A. § 15

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

Clayton Act § 7, 15 U.S.C.A. § 18

§ 18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to

regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79 of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board. Oct. 15, 1914, c. 323, § 7, 38 Stat. 731; Dec. 29, 1950, c. 1184, 64 Stat. —.

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